

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEONARD W. COE)	
Claimant)	
VS.)	
)	Docket No. 231,325
MCPHERSON CONTRACTORS, INC.)	
Respondent)	
AND)	
)	
KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND)	
Insurance Fund)	

ORDER

Claimant appealed the July 6, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument in Topeka, Kansas, on December 15, 1999.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for the respondent and its insurance fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a January 23, 1998 accident and resulting injury to the right ankle and right knee. Judge Benedict awarded claimant permanent partial disability benefits for a four percent functional impairment to the right lower extremity.

Claimant contends Judge Benedict erred by accepting the functional impairment opinion provided by Dr. Milo Sloo, III. Claimant argues that Dr. Sloo's opinion is flawed as the doctor (1) did not attempt to determine the amount of preexisting functional impairment

to the right knee and right ankle, (2) did not attempt to determine claimant's total functional impairment to the right knee and right ankle following the January 1998 accident, and (3) did not review or consider the medical records from claimant's earlier right knee and right ankle injuries in formulating his opinions about claimant's impairment. Claimant argues that the Judge should have (1) adopted Dr. Daniel Zimmerman's opinions as they allegedly are the more credible and (2) entered an award for a 20 percent permanent partial disability for a scheduled injury to the right lower extremity.

Conversely, respondent and its insurance fund contend that the Judge's finding of functional impairment should be affirmed. They argue that Dr. Zimmerman's opinions of impairment are not credible as they are based upon speculation. But respondent and its insurance fund contend Judge Benedict erred in awarding temporary total disability benefits following the right knee surgery that Dr. Sloo performed on July 28, 1998. They argue the surgery was performed to address injuries that were sustained before claimant began working for respondent and, therefore, claimant's temporary inability to work following that surgery was not related to the January 1998 accident.

The issues before the Appeals Board on this review are:

1. What is the nature and extent of claimant's injury and disability?
2. Are the temporary total disability benefits that were ordered paid from July 28, 1998, through September 28, 1998, related to the January 1998 accident?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

1. In mid-December 1997, claimant began working as a welder and carpenter for respondent, a construction company.
2. On January 23, 1998, claimant injured his right ankle and right knee when a concrete form slipped out from underneath him, causing him to fall to the ground.
3. Claimant first sought medical treatment at a hospital emergency room on January 29, 1998. Claimant later came under the treatment of Dr. Milo Sloo, III, a board-certified orthopedic surgeon.
4. Dr. Sloo first saw claimant on March 4, 1998. On that date, the doctor diagnosed (1) post-traumatic arthritis of the right knee and right ankle aggravated by recent minor trauma, (2) shortened right extremity due to prior open fracture of the tibia and fibula, and (3) chronic decompensated back. On March 4, 1998, Dr. Sloo found normal range of motion in both the right knee and right ankle. As a result of that examination, the doctor recommended that claimant return to light or sedentary work.

5. At his attorney's request, claimant saw Dr. Edward Prostic for a second opinion on March 30, 1998. Dr. Prostic recommended right knee arthroscopic surgery.

6. Following Dr. Prostic's evaluation, claimant returned to Dr. Sloo for a second evaluation on May 13, 1998. The findings from examining the right knee were the same, but the doctor found decreased range of motion in the right ankle. As a result of the second evaluation, Dr. Sloo recommended arthroscopic debridement of both the knee and ankle. His diagnosis remained the same.

7. On July 28, 1998, Dr. Sloo operated on claimant's right knee and right ankle. The doctor performed a right knee arthroscopy trimming the synovitis and removing a part of the medial meniscus. On the same date, the doctor also performed a right ankle arthroscopy trimming the anterior synovitis and removing an anterior tibial spur. At the August 24, 1998 follow-up visit, claimant had full motion in both the right knee and ankle.

8. Dr. Sloo last saw claimant on September 21, 1998, and released claimant with restrictions against lifting more than 30 pounds on a single lift or 25 pounds repetitively. Dr. Sloo also believes that claimant should avoid repeated bending and stooping and restrict himself to light or sedentary work.

9. Using the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment*, Dr. Sloo believes claimant has an additional two percent functional impairment to the lower extremity for the knee injury and an additional two percent functional impairment to the lower extremity for the ankle injury, which combine for an additional four percent impairment to the right lower extremity as a result of the January 1998 accident. In formulating that opinion, Dr. Sloo attributed the need for the partial medial meniscectomy to the January 1998 accident and attributed the ankle synovitis to that accident. But the doctor also testified that claimant's knee and ankle problems for which he operated were probably a natural and probable consequence of claimant's prior injuries and traumas. Dr. Sloo testified, in part:

Q. (Mr. Crowley) Is this impairment rating for the injuries sustained by Mr. Coe from this January 1998 injury for McPherson?

A. (Dr. Sloo) Yes. It's assuming that the partial medial meniscectomy was necessary because of the injury in January of '98. It's assuming that the synovitis was a result of a minor injury or sprain at the same date. The osteophyte, of course, was predating that.

Q. Relative to the surgery you performed, would it be medically reasonable to state that the conditions for which surgery was performed to treat and/or correct were a natural and probable consequence of the prior injuries and traumas suffered by Mr. Coe? And when I say prior I mean prior to January of 1998?

MR. BRYAN: Object to the form of the question and leading.

A. That's entirely possible.

Q. Could it be probable?

A. It is probable.

MR. BRYAN: Object as leading.

Q. In your opinion, would the surgery performed have been medically reasonable and necessary even before the January of 1998 injury?

MR. BRYAN: Object as calling for speculation since he never saw him before the injury occurred.

A. It very well might have been.¹

Despite the above testimony, Dr. Sloo acknowledged that the January 1998 accident aggravated the preexisting condition in claimant's right knee.

10. Claimant has a significant history of injury to his right leg that predates the January 1998 accident. In 1976, claimant fractured his right tibia, right fibula, and right ankle in a motorcycle accident.

In 1979, claimant injured his right knee and underwent surgery to repair the posterior cruciate ligament. And in 1980, a surgeon removed the tip of a screw from claimant's right knee. But following that surgery, claimant went a number of years without receiving any medical treatment for his right leg until he twisted his right knee and right ankle in October 1997 while working for another employer. According to claimant, after receiving medication and therapy for the October 1997 injury, the treating doctor released him to return to work without restrictions.

The history claimant provided Dr. Sloo also included a gunshot wound to the right thigh when claimant was 16 years old.

Despite those numerous injuries, Dr. Sloo believed that claimant really had no impairment from arthritis as late as 1995 and the doctor stated that claimant probably had a "pretty good" knee at that time.

¹ Deposition of Dr. Milo G. Sloo, III; June 2, 1999; pp. 19, 20.

11. Claimant acknowledges that he had some popping and grinding in his right knee and ankle before he started working for respondent. But those symptoms have increased following the January 1998 accident.

12. Dr. Daniel Zimmerman, who was hired by claimant to evaluate claimant's functional impairment, testified that claimant had a 40 percent functional impairment rating to the right lower extremity of which 50 percent preexisted. Therefore, Dr. Zimmerman believes that claimant sustained an additional 20 percent functional impairment to the right leg as a result of the January 1998 accident. In estimating and evaluating the preexisting functional impairment, unlike Dr. Sloo, Dr. Zimmerman reviewed the medical records from the doctors who had previously treated claimant's right knee and right ankle.

Dr. Zimmerman believes the January 1998 accident aggravated the preexisting degenerative changes in claimant's right knee and preexisting osteoarthritis in the right ankle.

13. Using the fourth edition of the *AMA Guides*, Dr. Zimmerman rated the right knee as a 16 percent lower extremity impairment of which 13 percent represented girth differences and four percent represented pain and sensory deficits. The doctor rated the right ankle functional impairment at 28 percent of which 18 percent represented range of motion loss, four percent represented pain, and eight percent represented weakness.

14. Dr. Zimmerman admits he somewhat arbitrarily apportioned the impairment from the January 1998 accident and the impairment from the preexisting condition. The doctor testified:

Q. (Mr. Crowley) How did you arrive at your apportionment of 50 percent between the 1998 accident and all other causes?

A. (Dr. Zimmerman) I just split them half and half because I couldn't figure any way to rate it that was objective. Purely my subjective idea of fairness.²

15. Considering the entire record, the Appeals Board finds that the January 1998 accident aggravated the preexisting degenerative changes in claimant's right knee and right ankle. Unfortunately, neither doctor's opinion is more persuasive than the other's regarding claimant's ultimate functional impairment. Dr. Sloo testified that the January 1998 accident aggravated claimant's preexisting condition in the right knee. But Dr. Sloo did not attempt to rate the preexisting impairment or the aggravation. On the other hand, Dr. Zimmerman rated claimant's ultimate impairment but admits that he was somewhat arbitrary in assessing the amount of preexisting functional impairment.

² Deposition of Dr. Daniel D. Zimmerman; May 14, 1999; pp. 43, 44.

The Appeals Board finds and concludes that the January 1998 accident caused additional functional impairment to claimant's right lower extremity in an amount somewhere between Dr. Sloo's four percent rating and Dr. Zimmerman's 20 percent rating. The Appeals Board averages those ratings and concludes that claimant sustained an additional 12 percent functional impairment to the right lower extremity as a result of the January 1998 accident.

16. The Appeals Board finds it is more probably true than not that the surgery performed by Dr. Sloo in July 1998 was directly related to the January 1998 accident and the resulting injury and aggravation to claimant's right knee and right ankle. Therefore, the temporary total disability benefits that were provided to claimant after that surgery were appropriate.

CONCLUSIONS OF LAW

1. The Award should be modified to increase the permanent partial disability rating to 12 percent for the scheduled injury to the right leg. That rating takes into consideration the preexisting functional impairment and awards claimant benefits for only the impairment sustained in the January 1998 accident.³

2. An injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁴ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates it.⁵

3. The Workers Compensation Act provides that a worker is entitled to a maximum of 200 weeks of permanent partial disability benefits for a leg injury.⁶ As provided by regulation,⁷ the number of weeks of temporary total disability benefits (28.71) is subtracted from 200 and the resulting number is then multiplied by the functional impairment rating (12 percent). That computation yields 20.55 weeks of permanent partial disability compensation that claimant is entitled to receive in this claim.

³ See K.S.A. 1999 Supp. 44-501(c).

⁴ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

⁵ *Woodward v. Beech Aircraft Corporation*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

⁶ K.S.A. 44-510d(a)(16).

⁷ K.A.R. 51-7-8.

AWARD

WHEREFORE, the Appeals Board modifies the July 6, 1999 Award entered by Judge Benedict and increases the permanent partial disability for the scheduled right leg injury to 12 percent.

Leonard W. Coe is granted compensation from McPherson Contractors, Inc., and its insurance fund for a January 23, 1998 accident and resulting disability. Based upon an average weekly wage of \$460, Mr. Coe is entitled to receive 28.71 weeks of temporary total disability benefits at \$306.68 per week, or \$8,804.78, plus 20.55 weeks of permanent partial disability benefits at \$306.68 per week, or \$6,302.27, for a 12 percent permanent partial disability, making a total award of \$15,107.05, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Matthew S. Crowley, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director